IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

CIVIL SECOND APPEAL No. 69 of 1983

AHMED KHAN
V/S
U.I.T. JODHPUR

Mr. M. MRIDUL, Senior Advocate assisted by
Mr. P.S. CHUNDAWAT, for the appellant / petitioner

Mr. R.G. PUROHIT, for the respondent

Date of Order : 4.7.2006

HON'BLE SHRI N P GUPTA,J.

JUDGMENT

This second appeal has been filed by the plaintiff against the impugned judgments and decrees, whereby the plaintiff's suit has been dismissed.

The case of the plaintiff, as disclosed in the plaint is, that he was appointed as LDC on temporary basis vide order dated 19.7.73, and since then he is working as Encroachment Inspector. Then on 23.1.73 (sic 23.1.74) he was falsely involved in an Anti Corruption case, inasmuch as, some currency notes, lying at some distance from the table on which he was working, were taken into possession, and alleging it to be not legal amount received by the appellant, inquiry was commenced. Then vide order dated 24.1.73 the appellant was placed under suspension, and it was directed that he shall be paid the subsistence

allowance. Then on 30.1.74 the appellant learnt, that the Secretary vide order No.530 dated 29.1.74 has passed the order of terminating the services of the appellant w.e.f. the date of receipt of the order. On coming to know of this, he submitted a representation, that till conclusion of inquiry, he may not be terminated from service, but to no good. Then on 30.1.74, he sent medical certificate by registered post. It was alleged that the appellant has not received the termination orders, but then the orders have been passed. According to the plaintiff, before passing such termination order, the suspension was required to be revoked, and the order of termination passed during subsistence of suspension order is illegal and void. It is then contended, that the appellant could not be removed from service without holding inquiry under Rule 16 of the CCA Rules, and that he was not served any notice before termination, as such, the termination is in violation of principles of natural justice, apart from the fact, that it is not a speaking order and it does definitely cast stigma, therefore, before passing such order, principles of natural justice were required to be complied with. It is then pleaded, that even if the plaintiff was treated to be a temporary employee, still before terminating his services one month's notice was required to be given, as contemplated by Rule 23-A of R.S.R., but no such notice has been given. The termination order was alleged to be malafide as well. With these allegations, it was prayed,

that the termination order be declared void, and the defendant be restrained from terminating the services of the plaintiff. The suit was subsequently amended.

A written-statement was filed on 7.2.74, and after amendment, a fresh written-statement was also filed on 24.4.78. However, since the material pleadings are common, I need not get involved in the question of amendment. The stand of the defendant in the written-statement is, that on 17.7.73, the plaintiff applied for appointment on account of his family circumstances, whereupon he was appointed on 19.7.73, with the specific stipulation about the appointment being temporary, and about it being liable to be terminated at any time without any notice, and accepting this, the plaintiff joined. It was pleaded that the post of LDC and Encroachment Inspector are the same, carrying the same scale. It was pleaded that a case has been registered against the plaintiff in the Anti Corruption Police Station and therefore, nothing need be said about that. Then it is pleaded, that on 24.1.74 the regular Secretary was on leave, and therefore, the officer looking after the routine work passed the order of suspension, on account of the plaintiff having been arrested. Then in para-6, it has been pleaded, that since the work of the plaintiff was not found to be satisfactory, an application was filed by one Narendra Kumar to the Secretary on 19.10.73, about the plaintiff having

misbehaved with him and having hurled abuses, whereupon explanation of plaintiff was called, but was not given, and therefore, he was transferred in the office of A. En. (East), where also his work was not found satisfactory, and complaints were received there, day in and day out. On 16.1.74 the A. En.(East) sent a complaint to the Secretary, about the plaintiff's unsatisfactory working, resulting into sufferance of loss by the Trust. On this report, the file was put up before the Secretary alongwith the office reports, and on 19.1.74 the Secretary passed the order, that the services be terminated under Rule 23-A of RSR. One month's pay in lieu of notice may be given, and his services be terminated accordingly. Thereupon formal order was prepared on 21.1.74, but since Secretary was on leave, it could not be signed, and on 28th January, when the Secretary returned, the Executive Engineer submitted the order dated 24.1.74 before the Secretary, whereupon on 28.1.74 the Secretary passed the order as under:

> "Seen the file. The orders given on 19.1.74 should have been complied instead of suspension. He has put in only six months service and I had previously given orders for his termination. Now issue orders of his termination immediately one months pay and allowances shall however be given to Shri Pathan in lieu of the period of notice u/r. 23-A of the RSR. We are not bound to retain him in service till the decision of the criminal case. Issue orders immediately.
>
> As dictated.
>
> Sd/-
> 28.1.74."

It was pleaded, that thus it is wrong on the part of the plaintiff to contend to have learnt about the order on 30.1.74, rather it was on 19.1.74 itself, that the plaintiff was informed about his services being terminated, and since the Secretary has proceeded on leave in the noon of 19th January, the order could not be issued, and was issued on 29.1.74, which was sent to him through the Cycle-Sawar, but the plaintiff declined to receive on 30.1.74, thereupon it was sent by registered post on 31.1.74, and on 1.2.74, one copy thereof was affixed on his house. Thus, it is pleaded, that the order was sufficiently served. It was pleaded, that no departmental inquiry is pending against the plaintiff, and on account of his services being temporary, they could be terminated in this manner without giving any show cause notice, or charge-sheet, or the like. Then it is pleaded, that the plaintiff being temporary employee, was paid one month's salary and allowance in accordance with Rule 23-A, and that the order is not stigmatic. It is an order of termination, plain and simple. It is then pleaded, that the order of suspension is wholly illegal, and is of no consequence.

The learned trial Court framed as many as 15 issues, and after completing the trial dismissed the suit. Against that dismissal an appeal was filed, that also has been dismissed, and therefore, the present second appeal

has been filed.

The appeal was admitted on 11.11.83, by framing the following substantial questions of law:

> "(i) Whether the circumstances preceding or attendant on the impugned order are relevant inspite of the fact that order on the face of it is innocuous & whether the preceding circumstances viz, reports against the appellant and involvement in a criminal case and his suspension order are the foundation of the termination?
>
> (ii) Whether Section 98 of the Urban Improvement Act is attracted in a suit for injunction by an employee to restrain the respondent from dispensing with the services and to direct the respondent to retain him in the service?
>
> (iii) Whether the service of the appellant could not be terminated without complying with the procedure envisaged under Article 311 of the Constitution of India when he had been under suspension on a criminal charge?"

However, during pendency of the appeal, on 18.10.2005, an application had been filed seeking to frame additional substantial questions of law, wherein three more questions were suggested, being, whether all which is said to have been done be deemed to be a case of one month's notice being served and or one month's salary being paid in lieu of one month's notice. The other question being whether a notice or a pay of one month being offered at the address which is not the address of the appellant-plaintiff can be deemed to be a case of service of notice or payment

of one month's pay, and the third being, whether the pasting of the order on the outer wall of the house in the manner it has been done can be deemed to be a compliance of the mandatory requirement of Rule 23(A) of the RSR as then existed. In this application, reference has been made, to some part of the written-statement, the statements of the witnesses, D.W.1, Yatendra Nath and D.W.2, Shakoor Mohd., and there-from it is sought to be contended, that all these statements make it manifestly clearly, that neither the order was sent to appellant plaintiff, nor the payment was made in lieu of the notice.

Vide order dated 7.2.2006, it was ordered, that the question, as to whether substantial questions of law now sought to be raised by the appellant arise in this appeal or not will be considered at the time of hearing of appeal. Accordingly, this application was considered by me on its merits.

At the outset, it may be observed that after stating the facts, the only contention raised was, that it is not established that the compliance of Rule 23-A was made, inasmuch as, neither one month's notice was given, nor the amounts payable in lieu thereof were paid, consequently the order of termination is vitiated.

Substantiating this argument, various long drawn

submissions were made, including that the evidence on record, in conjunction with the pleadings of the appellant, having not been properly read, and having not properly been assessed, and the evidence being self-contradictory, and that from the evidence it is not at all established that the amount was ever sent or offered to the appellant. Notwithstanding this being second appeal, I was taken through the entire evidence and pleadings, de-novo, including making submissions, like that, the cheque said to have been sent by registered post does not bear any marks of it being folded, while looking to the size of envelop, Ex.A-14, it is not possible for the cheque to enter the envelop, without being folded, and thus, the whole story of sending the cheque by registered post is after-thought, and a myth. This is only narrated by way of illustration, as to, to what extent the arguments were made on the factual aspect of the appreciation of evidence. Be that as it may.

Erring against myself, I have gone through the entire evidence afresh, with the assistance of the learned counsel for the appellant.

In view of the fact, that the only submission made is, on the anvil of non-compliance of Rule 23-A i.e. non-tender of the pay and allowances for the notice period, I need not detain, or go into the other substantial questions of law, as had been framed vide order dated 11.11.83, as

none of them have been argued.

Regarding the question, on the anvil of Rule 23-A, issues No.11 and 12 have been framed. Issue No.11 being, as to whether giving of one month's notice was necessary before termination of services, and issue No.12 being, as to whether the requirement of Rule 23-A regarding payment of one month's salary had been complied with.

The learned trial Court has found, while deciding issue No.12, that in view of the findings arrived at on issue No.11, it was not necessary to give one month's notice. However, appreciating the evidence, led on the side of the defense, it was found, that Shakoor Mohd., D.W.2 had gone to the house of plaintiff with the cheque and the termination order, where he found the plaintiff, but the plaintiff declined to receive the same. It was also noticed, that D.W.2 has clarified, that the plaintiff lives with his brother Mahamood Khan Thanedar in Police Lines, and earlier also he had occasioned to go at that house once or twice, and thus, it was found, that the requirements of Rule 23-A have definitely been complied with, and the plaintiff declined to receive the cheque.

Significantly, in the memo of appeal, filed before the learned First Appellate Court, these findings have not been seriously challenged, inasmuch as, only

ground taken was in para-10, that the decision of issue no.12 is illegal and is incorrect on facts, however no details were given, be that as it may. What is still more significant to note is, that in the arguments made before the learned Lower Appellate Court, this contention was not raised, as it does not find any mention in the entire judgment, rather the whole stress was, on the termination having been made without departmental inquiry and is therefore bad, and the termination order having been passed during subsistence of the suspension, and is, therefore also bad.

Then in the memo of appeal, filed even before this Court, the finding of the Court below on issue No.12 has not been challenged, on any of the grounds whatsoever. In that view of the matter, on the face of it, it cannot be said, that it is open to the appellant to raise all these arguments, as raised in the application dated 18.10.2005. At this place I may also notice, that on 7.11.2005, the appellant has also filed an application, seeking leave to amend the memo of appeal, and also filed amended memo of appeal. However, in the course of arguments, nothing was submitted about this amendment application, as such, that application automatically stands disposed of, for want of being pressed.

Notwithstanding all this, as noticed above, I

have gone through the entire evidence on record, the evidence of the parties, so also the documents produced by either side. I have closely gone through the evidence of P.W.1, the plaintiff, D.W.1, the then Secretary, and D.W.2 the server Shakoor Mohd., so also the documents produced by the parties. It would suffice to observe, that the cheque produced on record being Ex.A-12 does bear the folding marks, and also bears so many pin holes, as correspond to the envelop, Ex.A-14, and the AD Card, which clearly satisfies, that on a collective appreciation of these two documents, being Ex.A-14 and Ex.A-12, it is more than clear, that this cheque was sent in the envelop Ex.A-14. Likewise Ex.A-10 does also bear necessary folding marks, and pin holes. Thus, even on re-appreciation, it is more than clear, that the order, Anex.A-10, and the cheque Annex.A-12, were sent to the plaintiff by registered post, vide Ex.A-14. The cheque is dated 29.1.74. In these circumstances, in absence of anything to show, as to why Shakoor Mohd is telling lies, or has been cooked up against the appellant, his evidence being straight and simple, does inspire confidence. Significantly, the plaintiff himself has admitted, that Ahmad Khan Pathan is his brother, and they are speaking terms. However, he has tried to avoid, to disclose the truth, and has simply deposed to be not aware, as to whether he was living in the Police Lines or not. He has also not disclosed any motive, as to how and why, the evidence of Shakoor Mohd. has been cooked up, and should

not be believed. So far as the evidence of D.W.1 is concerned, even from his evidence, to me it is clear, that the cheque was prepared on 29.1.74 itself, and was sent alongwith Shakoor Mohd., and on plaintiff's declining to receive the same, it was sent by registered post. Thus, in my view, even on re-appreciation, the finding recorded by the learned trial Court on issue No.12, does not require any interference in this appeal.

Since no other point was argued, I do not find any force in the appeal. The same is, therefore, dismissed. The parties are directed to bear their own costs.

(N P GUPTA),J.

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